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No. 150

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,720.

WILLIAM A. WEGMANN,
Appellant,

vs.

NICHOLAS MANNINO et al.,
Appellees.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

U. S. COURT OF APPEALS
FILED
MAY 9 1958
EDWARD W. WADSWORTH
CLERK

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PETITION FOR REHEARING.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Plaintiff-Appellant above named, respectfully presents this Petition for Rehearing in the above styled cause and in support and justification therefor shows:

I.

The Court of Appeals in its opinion affirming the lower Court has clearly failed to recognize that the *Written Contract* of the parties consisted of not *ONE* document but *THREE* documents to-wit: Exhibits "A", "B", and "C" (Record pages 9, 15, 17).

II.

The Court has erroneously charged Appellant with failure to cite a Florida Case in support of "ownership through joint venture" (Opinion Page 8) by overlooking the Cited Florida Case of *Russell* v. *Thielin,* 82 So. 2d 143 (Original Brief of Appellant Pages 7 and 8), and said case is conclusive upon this Court under *Erie Railroad* v. *Tompkins.*

III.

The Court by its decision has failed to recognize the expressed exemptions from the terms of Section 475.01, exempting from registration one officer of every corporation engaged in the sale of its own properties.

Wherefore, upon the foregoing grounds, but without waiver as the other grounds as set forth in the original Brief, Petitioner respectfully urges that this Petition and its attending Brief be duly considered, granted and that the judgment appealed from be reversed.

Howard O. Rives

Of the Firm of
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Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I, Howard P. Rives, of the Firm of McMullen, Rives & Baskin, Attorneys for Appellant, William A. Wegman, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for the purpose of delay.

Howard P. Rives

HOWARD P. RIVES.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

As to Ground One.

Both the District Court and now this Court have failed to recognize the fact that the Written Contract actually consisted of an original document, Exhibit "A" (Record 9), Exhibit "B" (Record 15) and Exhibit "C" (Record 17).

The Appellee does not dispute the statement of law that "where a contract consists of several instruments that the true intent and construction is to be gathered from the contract as a whole."

Obviously from the Court's opinion as written the Court has overlooked the essential written modifications referred to as Exhibits "B" and "C" above.

The importance of Exhibit "B" as a part of the Contract was mentioned in the Original Brief on Page 5 thereof and the specific language of such Exhibit is as follows:

EXHIBIT B.

> In accordance with our mutual understanding, you are the owner of A. B. C. Excavating Company, who holds title to a plot of ground in Dunedin, Florida known as Harbor View Villas.
>
> Title to the aforementioned property is being transferred from A. B. C. Excavating Company to you personally and thence from you, personally, to a New Jersy corporation known as Harbor View Villas, Inc.
>
> *This corporation, after doing certain improvements, etc., to said land is to sell the land in the form*

of lots to private individuals and, in accordance with a certain agreement existing between the aforementioned A. B. C. Excavating Company and myself, I am to be paid a certain percentage of the profit that is made from the sale of said property.

Now this is to certify that our mutual understanding is that I am to wait for my percentage of the profit until such time as the aforementioned Harbor View Villas is sold to individual buyers.

It is further mutually agreed upon by you and I that the original percentage of commission or remuneration to be received by me shall be based upon the original cost of the ground of $175,000.00, plus the cost of engineering, dredging, grading, excavating, street surfacing or paving and conveyancing. When these costs are all accumulated into one total, that total is to be deducted from the accumulated sales of the aforesaid Harbor View Villas and, the difference between those two figures is the figure to be used in computing the percentage which is to be paid me for my services rendered, all of which, we, the undersigned, agree and certify.

(Signed) William A. Wegmann
(Signed) Nicholas Mannino

/s/ Leonard A. Spector
(Italics supplied.)

It is apparent that the Court has been confused by the complexity of the Contractual Agreements and has adopted the view that the compensation of the Appellant was related to his sales of lots. Exhibit "C" to the Contract provided as follows:

EXHIBIT C.

April 7, 1955

Mr. Nicholas Mannino:

Dear Sir:

In confirmation of our verbal understanding as of 4-5-55 and 4-6-55, in compliance with your request that Harbor View Villas be listed with brokers in adjacent cities to Dunedin, Fla. and including Dunedin, Fla. and in accordance with your desire to pay brokers a commission in excess of the 5% which is the allowance made in my contract with you and or A. B. C. Excavating in and agreement made between us on the 27th day of February 1954, wherein and therewith you are excluded from making any agreement with any other individual pertaining to the development or sale of lots or any other part thereof it is mutually agreed between us herewith that you employ the assistance of such brokers and pay them commission or bonuses up to 15% with the expressed understanding than any commission or bonus paid to any such broker in excess of 5% will be charged to the general developing expense of Harbor View Villas development and not as a direct charge against my renumeration which I am to receive out of the profits made from the development of Harbor View Villas Subdivision.

The above is hereby agreed upon by:

(Signed) Nicholas Mannino

(Signed) W. A. Wegmann

Witness

/s/ Leonard A. Spector

It is the position of the Appellant that the overall Contract clearly indicates that the gross profit to be derived by Appellant for his services was 25% of Appellees' net profit for which payment, Appellant was to supervise the laying and platting of lots, digging of canals, installation of streets, water and sewer lines, establishment of sales force and general acts commonly found in development contracts.

Actually after paying commissions to brokers employed on the project, he was to receive as his net profit 20%, less advertising and general office expense which he might incur in his supervision of this development.

Exhibit "C" heretofore quoted makes this arrangement even more clear in that it is apparent that Appellee Mannino was desirous of paying bonuses and that through Exhibit "C" it was mutually recognized that these commission bonuses paid to brokers or salesmen would be considered as a general cost of the development with the exception of the original 5% allowance which had been set up as a part of appellee's gross profit figure.

The fact that 10% of the gross sales price of initial lot sales by the corporation was to be set aside as an operating fund for payment of advertising and sales expenses, must be construed with the related provision of the Contract wherein it was agreed that the remaining 15% of Appellant's gross profit would be withheld until development had been completely liquidated. Appellant contends that it is therefore quite obvious that he, individually, was not receiving or expecting a real estate commission but in

truth and in fact at all times, was operating on an agreement of joint venture, furnishing capital and know-how as the purchase price of his net 20% interest in the development.

As to Ground Two.

That the Court has erroneously concluded that Appellant's position relating to "Joint Venture" is unsupported by a Florida Case inasmuch as Appellant has specifically cited a parallel Florida Case of *Russell* v. *Thielin et al.*, 82 So. 2d 143, wherein the *Supreme Court of Florida expressly found* that Plaintiffs who were developers under similar circumstances to case at bar by reciting: "Thielin and Thierry being 'real estate developers' had no license to sell real estate for other owners and apparently for this reason executed an option agreement." (82 So. 2d 143, 144).

Appellant respectfully contends that the Court should again carefully read pages 6, 7 and 8 of the Brief and especially the factual recitation and analysis of *Russell* v. *Thielin*, as shown on page 8 of Appellant's Brief. It is readily apparent that the Supreme Court of Florida recognizes that in "Development Contract Cases" of joint venture that Sec. 475.01 is not applicable. As shown in the cited portions of the Brief every element necessary for joint venture is present, specifically including sharing of losses and the sharing of profits. The Court should therefore upon reconsideration rescind its finding that no case has been cited by Appellant; should take note that there is no case cited in Appellee's Brief which this in any manner

rescinds the effect of the Thielin Case as binding authority on this Court.

As to Ground Three.

The Court in its decision has failed to recognize in connection with Exhibit "B" to the Contract the expressed exceptions and exemptions to the operation of *Section 475.01* of the Florida Statutes relating to corporations, which provides as follows, to-wit:

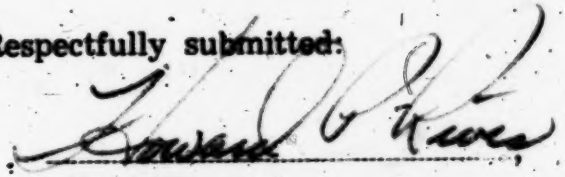
> "* * *; *nor shall said terms be applied to one officer of every corporation engaged in the sale of its own properties who shall be its president unless otherwise provided in its charter or by laws* * * *" (Italics supplied).

Appellant respectfully contends that in the reading of the overall contract it is readily apparent that the plan and contract of the parties was that the corporation, to-wit: Harbor View Villas, Inc., would sell the lots and that William A. Wegmann as president of the corporation was the officer entitled to such recognition as its president. In Exhibit "B" (heretofore set forth at length in this Brief, Page 4) it is shown that the corporation utilized by Wegmann and Mannino is parallel and comparable to the option theory approved by the Supreme Court of Florida in *Russell* v. *Thielin* heretofore cited. Appellant now respectfully urges that the opinion of the Court in its present form is an erroneous construction of the Florida Statutes and that the same now on rehearing should be corrected.

CONCLUSION.

Appellant respectfully submits in conclusion that rehearing of this cause should be granted; that the opinion as entered in this cause should be corrected and that Judgment reversing the decision of the lower Court and remanding this cause for new trial should be entered in lieu thereot.

Respectfully submitted:



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